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CONSTITUTIONAL LAW—LOCAL OPTION—POWER OF LEGISLATURE TO REGULATE AFTER VOTE BY COUNTY.—*Ex Parte Pricha*, 70 So. (Fla.) 406.—The constitution of Florida provided that the counties might determine whether the sale of intoxicants should be prohibited therein. After a county had voted to allow the sale, the legislature enacted that in those counties where the sale was permitted, no intoxicants could be sold in less quantities than one half pint, and then only in sealed receptacles, and not to be consumed on the premises. *Held*, such law is constitutional. Taylor, C. J., and Ellis, J., dissenting.

The legislature has the power to regulate the liquor traffic in the absence of a constitutional provision to the contrary. *People v. Schafran*, 168 Mich. 324. The power to regulate is not the power to prohibit. *Andrews v. State*, 50 Tenn. 165; *Mernaugh v. City of Orlando*, 41 Fla. 433. Nor does the power to regulate confer power virtually to prohibit. *Ex parte Patterson*, 41 Tex. Cr. Rep. 256. As this statute neither prohibits nor virtually prohibits the liquor traffic, it seems that it is a valid exercise of the police power. The construction put upon this local option clause of the constitution—that it merely gives the power to decide whether or not the sale shall be absolutely prohibited—is in accord with that of other courts. The Kentucky court in construing a similar statute, says in *Board of Trustees v. Scott*, 125 Ky. 545: "The only thing that ever has been submitted is: Shall the sale be prohibited? If the vote is that it shall not be, then the sale is nevertheless subject to police regulation by the state. . . . In fine, the effect of a 'wet' vote has always been construed to be that the legislature is then left a free hand to deal with the traffic in such community as may seem to it to be expedient."

R. C. W.

CONDEMNATION PROCEEDINGS—PROSECUTION OF APPEAL.—IN MATTER OF CITY OF NEW YORK V. GREEN, NEW YORK LAW JOURNAL, JAN. 19, 1916.—*Held*, In condemnation proceedings, the owner of the land may accept payment of award and still prosecute an appeal on ground that award was insufficient.

It is settled, as a general rule, that after a party receives payment of a judgment or decree, he cannot appeal therefrom, or prosecute an appeal theretofore taken. *Ducy v. Patterson*, 119 Am. St. Rep. (Colo.) 284; *People ex rel. Dunn v. Burns*, 78 Cal. 645. The reasons for the general rule as tersely stated in *Paine v. Woolley*, 80 Ky. 568 are as follows: "If the collection of the judgment be right, the appeal must be wrong, and if the appeal is well taken, the judgment ought not to have been collected." There is an exception to the general rule, namely, where the amount found in favor of the litigant by the judgment or decree is due him in any event, the only question to be determined by the appellate court is whether or not he is to receive a greater or an additional sum; then his acceptance of the amount awarded him by the judgment which he seeks to review does not preclude him from prosecuting a writ of error to obtain more. *Reynes v. Dumont*, 130 U. S. 354; *Jackson v. Brockton*, 182 Mass. 26. The distinction between the cases in which the acceptance of the fruits of the judgment bars the appeal, and those that do not is, whether or not

there is a possibility that the appellant will have to refund part of the amount received. In the principal case there is a possibility that the commissioners, upon a second appraisal, will make the award smaller, which would seem to place the principal case in the class barred by acceptance of the fruits of the judgment.

C. Y. B.

FOOD—DISEASED MEAT—ACTION AGAINST PACKER—DEFENSE—INSPECTION.—CATANI v. SWIFT & Co., 95 ATL. (PA.) 931.—In an action against the packer to recover for injury resulting to a consumer from the diseased condition of meat sold to the consumer by a dealer in the original packages, *held*, it is not defense that the meat was inspected and approved by federal inspectors under Act of Congress (U. S. Comp. St. 1913, Sects. 8717-8728) authorizing such inspection. Brown, C. J., *dissenting*.

A statute of Pennsylvania provided that "in every sale of meats, lard and other articles used for food . . . there shall be an implied contract that the goods are sound and fit for household consumption." P. L. 87, 3 P. & L. Dig., 2d E., p. 6727. The federal act of March, 1907 (34 U. S. Stat. 1256), provides that "any person who shall sell or offer for sale or transportation for interstate or foreign commerce, any meat or meat food products which are diseased . . . or otherwise unfit for human food, knowing such meat food products are intended for human consumption, shall be guilty of a misdemeanor." Neither of these statutes says anything about negligence.

Independently of statute, however, there are many cases which allow the ultimate consumer to recover against the packer or manufacturer. Manufacturer of pies, *Parks v. Yost Pie Co.*, 93 Kan. 334, L. R. A. 1915 C. 179; bottler of coca-cola, *Jackson Bottling Co. v. Chapman*, 64 So. (Miss.) 791; pork packer held liable to ultimate consumer for injuries resulting from packer's failure to inspect, *Ketterer v. Armour & Co.*, 200 Fed. 322. Some cases base the right of the ultimate consumer to recover on an implied warranty of the manufacturer. *Chapman v. Roggenkamp*, 182 Ill. App. 117. "And such warranty is available to all who may be damaged, including the retailer as well as the ultimate consumer." *Mazetti v. Armour & Co.*, 75 Wash. 622. But it has been held that retailers and innkeepers and victuallers furnishing such goods for food are not liable for the injuries resulting, though the food is in fact poisonous, *Trafton v. Davis*, 110 Me. 318 (i. e., in the absence of evidence of negligence on the retailer's part); *Valeri v. Pullman Co.*, 218 Fed. 519. *Contra*, *Doyle v. Fuerst & Kraemer*, 129 La. 838. The decision of the principal case seems clearly right on principle and under the statutes involved.

S. B.

JUSTICES OF THE PEACE—APPEAL—JURISDICTION—FICTITIOUS SET-OFF AND COUNTERCLAIM.—ROSE v. O'BRIEN ET AL., 87 S. E. (W. VA.) 378.—*Held*, That a defendant in an action before a justice of the peace is not permitted to file a fictitious and unproved set-off or counterclaim, and thereby raise the amount in controversy so as to bring it within the appellate jurisdiction of a circuit or superior court.